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No. 73-531

In the Supreme Court of the United States

OCTOBER TERM, 1973

SHEARN MOODY, JR., PETITIONER

v.

UNITED STATES OF AMERICA AND GERALD T. CULVER, SPECIAL AGENT, INTERNAL REVENUE SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The *per curiam* opinion of the court of appeals (Pet. App. 42) is not reported. The memorandum and order of the district court (Pet. App. 21-41) is reported at 356 F. Supp. 370.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1973. A petition for rehearing was denied on August 13, 1973. The petition for a writ of certiorari was filed on September 24, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

526-504—73——1

QUESTIONS PRESENTED

1. Whether an Internal Revenue Service summons issued to petitioner's receiver in the course of a civil tax audit and prior to a recommendation of any criminal prosecution was valid and enforceable.

2. Whether petitioner can claim Fourth and Fifth Amendment rights in documents which he voluntarily turned over to a temporary receiver.

STATEMENT

Following the refusal of E. O. Buck, receiver for W. L. Moody & Company, Bankers (Unincorporated), to comply with an Internal Revenue Service summons issued pursuant to Section 7602 of the Internal Revenue Code of 1954, Special Agent Culver and the United States commenced this proceeding to enforce the summons under Section 7604 of the Code. The summons was issued by Special Agent Culver. Petitioner Shearn Moody, Jr., intervened as the real party in interest (Pet. App. 21). The district court enforced the summons and the court of appeals affirmed *per curiam* (Pet. App. 41–42).

W. L. Moody & Company is an assumed name under which petitioner engaged in the banking business as a sole proprietor. Pursuant to court order, E. O. Buck was appointed temporary receiver of W. L. Moody & Company on September 7, 1972, and took possession of substantially all of the records of the banking business (Pet. App. 63–68). The summons at issue concerns only those records in the possession of the receiver.

The district court entered the order appointing the temporary receiver because of concern that a proposed Securities and Exchange Commission action enjoining the bank from further violations of the securities laws might cause serious financial loss to the bank and depositors. Petitioner neither consented to nor opposed the order, and he did not assert any constitutional privilege against the transfer of assets (including records) to the receiver.[1] The district court found that "[i]n substance, the transfer of such property and assets (including the Bank records) was voluntary" (Pet. App. 26–27).

The receivership arose after a Securities and Exchange Commission investigation into the affairs of W. L. Moody & Company. Pursuant to the investigation, on July 10, 1972, a Securities and Exchange Commission subpoena addressed to W. L. Moody & Company was served on E. Douglas McLeod, executive vice president. On July 13, 1972, Rodger Bridges, an attorney, appeared at the bank and stated to the Securities and Exchange Commission attorneys that he represented the bank. Before making any records available, Bridges stated that he was aware of the constitutional privilege to refuse to comply with the Securities and Exchange Commission subpoena but that the records would be produced voluntarily (Pet. App. 23–24).

[1] Petitioner made a timely claim of Fifth Amendment privilege only with respect to some records which were sealed in safety deposit boxes at the bank building and have not been in the possession of the receiver. The government has made no attempt to reach those sealed records (Pet. App. 25, 27–28).

Until the appointment of the receiver on September 7, 1972, the Securities and Exchange Commission personnel had access to all of the bank records and they made copies of many of the records. On August 3, 1972, petitioner himself was served with a Securities and Exchange Commission subpoena, and at that time he executed a letter stating that "it is agreeable with me for this investigation by the Securities and Exchange Commission to continue until further notice is given by me to the contrary." No contrary notice was given (Pet. App. 24–25).

After the appointment of the receiver, the Internal Revenue Service assigned Special Agent Culver to supervise the investigation with Revenue Agent Robert Coyle, who had been investigating the correctness of petitioner's income tax returns for 1969 and 1970 (Pet. App. 28–29). Culver issued the summons at issue one month later in October 1972. Special Agent Culver testified that he had made no recommendation for criminal prosecution of petitioner (Tr. 40).[2]

Because of the continued investigation by Revenue Agent Coyle into the correctness of petitioner's tax returns, the district court found that the Internal Revenue Service inquiry had the "requisite civil element" to support enforcement of the summons (Pet. App. 39). The court also found that petitioner had relinquished his right to assert a Fifth Amendment privilege in the documents in the receiver's possession be-

[2] "Tr." references are to the transcript of proceedings in the district court contained in the record on appeal.

cause he had voluntarily turned them over to the receiver (Pet. App. 31–36). Alternatively, the court held that he had waived his privilege by allowing inspection of the documents by Securities and Exchange Commission attorneys (Pet. App. 36–37).

ARGUMENT

1. In concluding that the Internal Revenue Service summons was properly enforceable, both courts below correctly applied the standard announced in *Donaldson* v. *United States,* 400 U.S. 517, that "under § 7602 an internal revenue summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution" (400 U.S. at 536). Here, as previously noted, no recommendation for prosecution was made, and petitioner does not contend otherwise. However, he asserts (Pet. 9) that the sole purpose of the summons was to secure evidence to prosecute him for criminal fraud. In support of his argument, petitioner cites the district court's statement (Pet. App. 29) that the investigation was "entirely criminal in nature with the object of discovering and proving tax fraud by the taxpayer."

This statement, taken out of context from the district court's detailed memorandum and order (Pet. App. 21–41), does not fairly represent its characterization of the tax investigation. To the contrary, the district court found that there were civil aspects to the inquiry since it stated that "the correctness of Moody's returns is still at issue" (Pet. App. 38). It further found that "the civil aspects of Moody's case

are still present because Revenue Agent Coyle's work which will proceed concurrently is not complete." As a result, the district court concluded that "[s]o long as both an auditor and a special agent are working on the case, it retains the requisite civil element" (Pet. App. 39).

These findings and conclusions are completely in accord with *Donaldson,* which held that the fact that the investigation may uncover evidence of what may prove to be criminal conduct does not bar the use of the administrative summons prior to a recommendation for prosecution.[3] As long as the determination of civil tax liability is one of the purposes for the issuance of a summons, the courts of appeals are agreed that the *Donaldson* test of good faith has been met. See, *e.g., United States* v. *Cleveland Trust Co.,* 474 F. 2d 1234, 1236 (C.A. 6), certiorari denied *sub nom. Miceli* v. *United States,* No. 72–1606, October 9, 1973; *United States* v. *Wall Corp.,* 475 F. 2d 893, 894–895 (C.A. D.C.); *United States* v. *Richardson,* 469 F. 2d 349, 352 (C.A. 10); *United States* v. *National State Bank,* 454 F. 2d 1249, 1251–1252 (C.A. 7); *United States* v. *Couch,* 449 F. 2d 141, 143 (C.A. 4), affirmed, 409 U.S. 322; *United States* v. *Troupe,* 438 F. 2d 117, 119 (C.A. 8).

[3] A recommendation for prosecution does not occur until the case is referred to the Department of Justice. "While a criminal investigation remains solely within the Internal Revenue Service, the civil aspects are inextricably associated with the criminal." *United States* v. *Billingsley,* 469 F. 2d 1208, 1209–1210 (C.A. 10). Any discovery of fraud would have the important civil consequences of the determination of deficiencies and penalties under Section 6653 of the Code.

2. Petitioner's Fifth Amendment claims[4] (Pet. 9–14) have long been foreclosed by *Dier* v. *Banton*, 262 U.S. 147, involving a grand jury subpoena seeking books and records addressed to a receiver in an involuntary bankruptcy. There, the Court held that an individual's right to claim a Fifth Amendment privilege in his books and records ceased even when possession and control of the books and records was transferred involuntarily to a receiver (262 U.S. at 149–150). Given petitioner's failure to contest the transfer of the bank's records to the receiver and the district court's finding (Pet. App. 27) that the transfer was voluntary, the decision below followed *a fortiori* from *Dier*.

The fact that the receiver took no title to the books and records is immaterial.[5] This Court has repeatedly rejected the contention that mere title—without possession—can serve as the basis for a Fifth Amendment privilege in documents. *Couch* v. *United States*, 409 U.S. 322, 331–335, and cases cited therein.[6] As a

[4] Despite petitioner's assertions to the contrary (Pet. 2), it is also well settled that an Internal Revenue summons directed to a third party is not subject to a Fourth Amendment challenge. *Donaldson* v. *United States*, *supra*, 400 U.S. at 522, and cases cited therein.

[5] Petitioner's attempt (Pet. 11) to distinguish *Dier* on the ground that the receiver in that case had title to the books and records is without merit. The Court specifically stated that "the books and papers were in the hands of the Receiver who ha[d] no title * * *" (262 U.S. at 149).

[6] To the extent that *Clark* v. *State of Delaware*, 269 A. 2d 59 (Del.), relied on by petitioners (Pet. 13), appears to turn on the fact that a temporary receiver did not hold title to records in his custody, the decision is contrary to this Court's holdings in *Dier* and *Couch*.

result of the receiver's possession, "the ingredient of personal compulsion against an accused" necessary to support a Fifth Amendment claim did not exist. *Couch* v. *United States, supra,* 409 U.S. at 329.

Moreover, petitioner had no legitimate expectation of privacy in these records, which were voluntarily turned over to the receiver to be used by him as he saw fit in discharging his duties.[7] The receiver was responsible to the district court and not to petitioner. Petitioner had no right under the Order Appointing Temporary Receiver (Pet. App. 63–68) either to exercise any control over the receiver or to prevent any disclosure of the records which the receiver might choose to make. Likewise, he had no right to demand or regain possession of the records until the receivership was terminated or modified. This was no mere fleeting divestment of possession for the limited purpose of passive custodial safekeeping by another, cf. *Schwimmer* v. *United States,* 232 F. 2d 855 (C.A. 8), certiorari denied, 352 U.S. 833; *United States* v. *Guterma,* 272 F. 2d 344 (C.A. 2), which this Court has indicated might constitute "constructive possession" for Fifth Amendment purposes. See *Couch* v. *United States, supra,* 409 U.S. at 333–334, n. 16.

3. Finally, petitioner's complaints (Pet. 15–19) concerning actions taken by the Securites and Exchange Commission before appointment of the receiver are

[7] For example, in the Order Appointing Temporary Receiver, the receiver is directed to "marshal the assets of the defendant, W. L. Moody and Co., Bankers, Unincorporated, and as soon as possible * * * cause to be paid all deposits, time, demand or saving certificates * * *" (Pet. App. 65).

irrelevant to the enforceability of the Internal Revenue Service summons. Whatever privileges petitioner may have had against the actions of that agency were waived by attorney Bridges' statement before the Securities and Exchange Commission that although he was aware of the bank's right to refuse to comply with the Securities and Exchange Commission subpoena, he would not object to its compliance (Pet. App. 24) and by petitioner's subsequent letter to the Commission (Pet. App. 25).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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